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CIVIL AUTHORITY VERSUS MILITARY.

The constitution of each state in the Union, except New York, provides for the subordination of the military to the civil power.¹ Two state constitutions provide that the military shall be subordinate to and governed by the civil power.² Five commonwealths have constitutions providing that the military ought to be under strict subordination to and control of the civil power.³ The exact significance of these constitutional provisions is a subject of controversy.

An excellent example of the issues involved is found in the case of *State v. Brown*.⁴ The constitution of West Virginia states that "no citizen, unless engaged in the military service of the state, shall be tried or punished by any military court, for any offense cognizable by the civil courts of the state."⁵ Nevertheless this provision of the constitution did not prevent the declaration of martial law by the executive and legislative departments of the state government. This action virtually suspended the constitution. A governor became dictator. He decided the duration and extent of his authority. The military became the instrument to enforce his will. The danger is self-evident. Citizens were placed at the mercy of the military authorities during the period of an emergency, the existence of which was not the subject of judicial determination.

The United States war department has published the syllabi of the opinion in the West Virginia case, "for the information of the service in general," as follows:⁶

"The governor of this state has power to declare a state of war in any town, city, district, or county of the state, in the

1. Columbia Digest; Index Digest of State Constitutions, p. 980; Stimson, Federal and State Constitution, § 292.

2. Massachusetts, Pt. I, 17; South Carolina, I, 26.

3. Maryland, Decl. R., 30; New Hampshire, I, 26; North Carolina, I, 24; Vermont, I, 16; Virginia, I, 13.

4. *State ex rel. Mays v. Brown*, (1912) 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996.

5. West Virginia, III, 12.

6. Dig. of Ops. of Judge Adv. Gen., etc., July 1, 1912, to April 1, 1917, pp. 208, 209.

event of an invasion thereof by a hostile military force or an insurrection, rebellion, or riot therein, and in such case, to place such town, city, district or county under martial law.

"The constitutional guaranties of the subordination of the military to the civil power, . . . are to be read and interpreted so as to harmonize with other provisions of the Constitution, authorizing the maintenance of a military organization," [and the presumption against] "intent on the part of the people, in the formulation and adoption of the constitution, to abolish a generally recognized incident of sovereignty, the power of self preservation. . . ."

This view, that martial law is "a generally recognized incident of sovereignty," is of great interest when compared with the express provisions of several of the state constitutions forbidding or limiting the scope of martial law. Thus the Tennessee constitution provides that:

"Martial law, in the sense of the unrestricted power of military officers . . . is inconsistent with the principles of free government, and is not confided to any department of the government of this state."

It is true that the Tennessee constitution also states that no citizen is subject to martial law except those in "the army of the United States, or militia in actual service."⁷

The constitutions of Massachusetts and New Hampshire provide that the government may use and exercise "martial law in time of war or invasion, and also in time of rebellion, declared by the Legislature to exist."⁸

Three states expressly recognize the extension of martial law to civilians, by legislative approval of the executive declaration; but only members of the naval force and militia in active service are punishable under martial law except by the consent of the legislature.⁹ Most of the state constitutions make no reference to martial law. Rhode Island appears to recognize the true situation with the statement: "The law martial shall be used and

7. Tennessee, I, 25. See also, Vermont, I, 17; Maryland, Decl. R., 32.

8. Massachusetts, Pt. II, Chap. 11, §§ 1, 7; New Hampshire, II, 50.

9. Massachusetts, Pt. I, 28; New Hampshire, I, 34; South Carolina, I, 27.

exercised in such cases only as occasion shall necessarily require." ¹⁰

What is the significance of the few constitutional references to martial law? Was it confused by the framers of the state constitutions with military law? Or was it tacitly recognized that a sovereign state has the right of self defense? Certainly the distinction between martial and military law is of great importance and fundamental in the consideration of this constitutional question.

Martial law as a domestic fact presupposes a condition in which the civil courts are unable to enforce their processes and is justified by the necessity of society protecting itself during an emergency period until the civil courts may again resume their proper functions. It is "the suspension of all law but the will of the military commanders entrusted with its execution, to be exercised according to their judgment, the exigencies of the moment, and the usages of the service, with no fixed or settled rules or laws, no definite practice, and not bound even by the rules of the military law." ¹¹ "When martial law prevails the civil power is superseded by the military power, and the ordinary safeguards to individual rights are for the time being set aside, but it is incumbent on those who administer it to act in accordance with the principles of justice, honor, and humanity and the laws and usages of war." ¹²

Military law must be carefully distinguished from martial law, which applies to civilian persons not ordinarily subject to military authority. Martial law may exist under a military government, established in hostile or occupied territory.¹³ It may also exist as a domestic fact within the boundaries of the United States. Military law ordinarily applies to military persons only (with exceptions as to retainers to the camp, spies, etc.), and is applicable in time of peace as well as in time of war. Martial law is temporary in character. It exists only to combat an emergency condition. It applies to all persons and things within the

10. Rhode Island Const., Art. I, 18.

11. Pomeroy, Constitutional Law, § 712.

12. Dig. of Ops. of Judge Adv. Gen., 1912, p. 1079.

13. Moore, International Law Dig., VII, § 1147.

area under control, and during such emergency period the will of the commander is supreme, except in so far as international law may restrain his conduct in hostile or occupied territory. It was used in the Revolutionary War by Washington at Valley Forge. It was declared by General Jackson at New Orleans. Martial law existed in Rhode Island in 1842.¹⁴ During the Civil War the President, under legislative authority, repeatedly declared martial law to exist in enemy territory.¹⁵ During the past five years martial law has been actually declared in six states of the Union.¹⁶ A condition of quasi-martial law has also been declared in other instances; as in Minnesota, October, 1918, when the militia was called out to maintain order and do relief work necessitated by a great forest fire.

When courts have been destroyed or made incompetent to act, does the military in its own right take the place of the authority that has disappeared and for the period of the emergency supersede the civil authority? There can be no doubt concerning the possibility of martial law in the United States. The four dissenting judges in *Ex parte Milligan* held that "it is within the power of Congress to determine in what state or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses" against public safety. This means that it is possible to place civilians on trial before military tribunals although they are not members of the "land or naval forces" and have not been held to answer "on a presentment or indictment of a grand jury."¹⁷

14. *Luther v. Borden*, (1848) 7 How. (U. S.) 1, 12 L. Ed. 581.

15. *Ford v. Surget*, (1878) 97 U. S. 594, 24 L. Ed. 1018.

16. Colorado, Georgia, Montana, Ohio, Texas, West Virginia.

17. Const., Fifth Amendment. Is the provision in the fifth amendment surplusage in so far as it excepts "cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger?" All court-martial proceedings, of course, deny the accused a jury trial as provided for in the sixth amendment. It would appear more logical to consider court-martial proceedings as a part of the military powers of the executive department, non-judicial in character, and hence the accused has no constitutional right to the protections guaranteed in the case of judicial criminal proceedings. If this is true, why make the exception referred to in the fifth amendment?

Even the Kentucky court, which has limited the authority of the military most closely in the United States, says: "We have not in mind a state of case in which actual war . . . exists . . ." ¹⁸

Yet Willoughby writes: "There is then strictly speaking no such things in American law as a declaration of martial law whereby the military is substituted for civil law." ¹⁹ Nevertheless a number of states have legislated to protect the soldier from both civil and criminal liability for his acts when in active military service pursuant to duty.²⁰ These statutes apply to a case arising either under martial law or military law. A typical statute is the existing Minnesota law:

"The commanding officer of any militia force engaged in the suppression of an insurrection, the dispersion of a mob, or the enforcement of the laws shall exercise his discretion as to the propriety of firing upon or otherwise attacking any mob or other unlawful assembly; and, if he exercise his honest judgment thereon, he shall not be liable in either a civil or a criminal action for any act done while on such duty. But no officer, under any pretense or in compliance with any order, shall direct or permit his men, or any of them, to fire blank cartridges upon any mob or unlawful assemblage, under penalty of dishonorable dismissal from the service. No officer or enlisted man shall be held liable, in either a civil or a criminal action, for any act done under lawful orders and in the performance of his duty." ²¹

But it may be seriously questioned whether such a statute does not attempt to deprive a citizen of his property without due process of law so far as the tort action for damages is concerned.²² Under a statute similar to the Minnesota section quoted it would

18. *Franks v. Smith*, (1911) 142 Ky. 232, 134 S. W. 484, L. R. A. 1915A, 1141, 1163.

19. Willoughby, *Const. Law*, II, § 727.

20. *Consol. Laws N. Y.*, p. 2339, military code, § 14. *Revised Laws of Hawaii*, 1915, § 208: "Members of the militia ordered into active service of the Territory by any proper authority shall not be liable, civilly or criminally, for any act or acts done by them in pursuance of duty in such service."

21. *G. S.* 1913, § 2379.

22. *O'Shee v. Stafford*, (1908) 122 La. 444, 47 So. 764, 16 *Ann. Cas.* 1163.

be impossible successfully to prosecute a military officer or soldier in a civil court for an alleged crime committed in the honest and faithful performance of duty. It is thus evident that the military is not at all times subordinate to the civil authority. Although the tort action may be successfully maintained, as held in the Louisiana case cited, at least so far as superior officers are concerned, yet the possibility of a civil action could hardly restrain financially irresponsible members of a military organization who are practically immune from punishment so long as military orders are obeyed.

The possible relation between the military authority and the civil courts is well illustrated in the letter of Chief Justice Chase to President Johnson, October 12, 1865.²³ The Southern states were under martial law in a part of the Chief Justice's circuit and for that reason he wrote to the executive objecting to the holding of the circuit court: "A civil court in a district under martial law can only act by the sanction and under the suspension of the military power, but I cannot think it becomes justices of the Supreme Court to exercise jurisdiction under such conditions." Justice Wayne, whose circuit was also partly within the Southern states then in rebellion, also concurred in the views expressed by the Chief Justice.

There are three general conditions under which the relation between the civil and military authority may be discussed: (A) military government, (B) martial law, (C) military law.

(A) When a military government replaces the existing sovereign power in invaded or occupied territory the military is supreme and remains in control until withdrawn by the President or superseded by civil authorities established by legislative action.²⁴ The power of the military government is complete during the period of the war, limited only by international law. When peace returns and the occupied territory is not returned to the former sovereign the military government becomes merely the agent of the new sovereign civil authority about to be estab-

23. *In re Davis*, (1867-71) Fed. Case No. 3621a, 7 Fed. Cases 63, 66.

24. Magoon, *Reports on the Law of Civil Government in a Territory Subject to Military Occupation*, p. 17.

lished.²⁵ During the war, however, the courts are merely the agents of the military government and in the opinion of the Supreme Court they are subject to the military power, and their decisions are under its control, whenever the commanding officer thinks proper to interfere.²⁶ Upon the restoration of peace the military government is subject to congressional control and the relation between the military and civil courts is subject to legislative enactment.

(B) Martial law becomes a necessity when civil authorities prove unable to control domestic or foreign occupied territory within a given locality. The sovereign power is not questioned. Civil authority has, however, disappeared within the area in question. Constituted authority is not overthrown by the declaration of martial law. An existing fact is merely given executive or legislative recognition. A great calamity such as an earthquake, flood, or fire may close the civil courts as effectively as an insurrection or a riot. All the constitutional and other rights of citizens become for the time being unenforceable. A necessity therefore exists for prompt and efficient action to restore civil authority and constitutional rights. Experience has demonstrated the necessity and wisdom of the use of martial law in such emergencies. Furthermore, the civil branch of the government displaced by disaster, or demonstrated to be incapable of controlling a mob, should not seek to embarrass the military authority which is endeavoring to restore order and the rights of citizens who have looked in vain to the courts for relief.²⁷

The United States constitution clearly recognizes the possibility of a state becoming involved in war.²⁸ If actually invaded by a foreign power, the state has the right to engage in war and this as a consequence may result in the declaration of

25. See also, in *Santiago v. Noguerras*, (1909) 214 U. S. 260, 265, 53 L. Ed. 989, 29 S. C. R. 608: "The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander-in-Chief."

26. *Jecker v. Montgomery*, (1851) 13 How. (U. S.) 498, 515, 14 L. Ed. 240.

27. Wallace, 8 Journal of Crim. Law and Cr., pp. 167, 406.

28. Art. I, § 10, Cl. 2.

martial law.²⁹ "Unquestionably, a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government . . . and if the state required the use of military force and the declaration of martial law, we see no ground upon which this court can question its authority."³⁰

It is sometimes said that the provision of the United States constitution that states may engage in war when "in such imminent danger as will not admit of delay" refers to danger from a foreign force or from Indians. That was undoubtedly the correct interpretation of Article VI, Section 5 of the Articles of Confederation. But the wording of the United States constitution amply justifies the construction placed upon it by the court in *Luther v. Borden*: "It was a state of war and the established government resorted to the rights and usages of war." A group of insurrectionists in a border state might invite foreign assistance and organize to co-operate with such foreign power. The real danger might well be from within and not admit of delay. Surely in such a case a state is authorized to act, even if the struggle develops into actual warfare. Would a state like West Virginia, threatened by insurrection and sedition, be powerless to act and dependent upon federal aid only? Such a doctrine would deprive the states of the right of self-defense.³¹ A state may declare martial law in time of insurrection or invasion and such a crisis may result in war as truly as the Civil War thus developed within the nation.

Martial law recognizes an emergency during which the military is superior to the civil authority. "If the inhabitants of the state, or a great body of them, should combine to obstruct

29. But see the dissenting opinion of Justice Woodbury in *Luther v. Borden*, *supra*; and also Willoughby, *Const. Law*, II, p. 1239: "Indeed, it may be said that a state of the Union has not the constitutional power to create, by statute or otherwise, a state of war, or by legislative act or executive proclamation to suspend, even for the time being, all civil jurisdiction."

30. *Luther v. Borden*, *supra*, majority opinion, by Taney, C. J.

31. Wallace, 8 *Jour. of Crim. Law and Cr.* 406.

interstate commerce, or the transportation of the mails, prosecution for such offenses had in such a community would be doomed in advance to failure.”³² Thus the governor of Idaho, facing a condition of civil incompetency in Shoshone County which had extended over a period of several years, very properly restored civil authority by temporarily establishing martial law.³³ Likewise when the governor of Colorado acted in the crisis which had arisen in that state as an outgrowth of strikes and disorders he substituted the military for the powerless civil authority. The Supreme Court of the United States recognized and approved this action and declared that “public danger warrants the substitution of executive process for judicial process.”³⁴

The case of *Hatfield v. Graham*³⁵ illustrates the possibilities of martial law. It was alleged that war and insurrection existed in Fayette, Kanawha, and Boone counties, that many lives were lost, much property destroyed, and that the state spent five hundred thousand dollars in suppressing it. Under these circumstances the governor alone was the judge of the necessity of declaring martial law, and the fact that the courts were in session did not prevent the establishment of martial law within the same area.

In his strong dissenting opinion Judge Robinson stated that the majority opinion denied to the plaintiff the constitutional right to a judicial determination of the justifiableness or maliciousness of the acts of the military. He also held that it was a judicial question as to whether the governor had acted within his political jurisdiction; that the decision of the majority “permits a governor to deal with private rights as he pleases. He need only answer that he does so officially. . . . Such a view is wholly un-American, and inconsistent with constitutional government; reason and authority condemn it; and the

32. In re Debs, (1895) 158 U. S. 564, 39 L. Ed. 1092, 15 S. C. R. 900.

33. In re Boyle, (1899) 6 Idaho 609, 57 Pac. 706.

34. Moyer v. Peabody, (1908) 212 U. S. 78, 53 L. Ed. 410, 29 S. C. R. 235.

35. (1914) 73 W. Va. 759, 81 S. E. 533, Ann. Cas. 1917C 1.

administration of even-handed justice cries out against it." ³⁶

Yet there seems to be no escape from the conclusion that martial law becomes a necessity in time of emergency. But the liability of the military officer or the subordinate after the emergency has passed remains to be considered. Inasmuch as the standing of the military person before a civil court, in such case, is the same whether the act in question was committed under military law or martial law, this subject is treated under military law in relation to civil courts.

(C) The relation between civil courts and the military on questions of military law may well be considered under the following divisions: (a) The military person who seeks relief in the civil courts from the action of a military tribunal; (b) the military person who pleads as his defense before a civil court his military status or a military order; (c) the military person who is charged with having violated the civil law and is demanded by the civil authorities.

(a) Courts-martial are not a part of the judiciary of the United States. They are created by orders. To convene such courts and to act upon their proceedings is an attribute of command. The legal sentence of a court-martial when duly executed, as by discharge from the army, cannot be "reached by pardon, nor revoked, recalled, or modified, either by Congress or by the Executive." ³⁷ If jurisdiction of the subject

³⁶. See the address of W. G. Mathews, president of the West Virginia Bar Association (Proceedings, 1913, p. 16). He not only condemned the majority opinion of the supreme court in *State v. Brown* and the doctrine sustained by the court in *Hatfield v. Graham*, but the action of the governor in preventing a decision by the Supreme Court of the United States on the issues involved. "By the subsequent pardon of those convicted by the military commission and denied relief by our supreme court their cases cannot be reviewed by the Federal Supreme Court." The discussion of the above address by the Bar Association appears on pages 58 to 85. The address being referred to a committee, their report adverse to any action appears in the proceedings for the following year, 1914, pp. 110, 111. It is thus evident that Judge Robinson's dissenting opinion was approved by many members of Association.

³⁷. Dig. of Ops. of the Judge Adv. Gen., 1912, p. 577.

matter and person by the military tribunal exist, no court of any state or of the United States can revise, set aside, or review the judgment of the military court. "It is not the office of the writ of habeas corpus to perform the functions of a writ of error in reviewing the judgment of a court-martial . . . There must be jurisdiction to hear and determine, and to render the particular judgment and sentence imposed; but, if this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally, or redressed by habeas corpus. These principles have been repeatedly declared by the authorities."³⁸ The decision, therefore, of a military tribunal acting "within the scope of its lawful powers . . . cannot be reviewed or set aside by the civil courts."³⁹

The authority to establish courts-martial and the powers of such courts are derived from the military powers of Congress and the Executive Department. "The power is given without any connection between it and the third article of the constitution defining the judicial power of the United States; indeed, the two powers are entirely independent of each other . . . If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."⁴⁰ This statement is, of course, based upon the assumption that jurisdiction of both subject matter and person was obtained by the court-martial.

The recent case of *Higgins v. Stotesbury*⁴¹ is in conflict with this general doctrine of the independence of military tri-

38. *Rose v. Roberts*, (1900) 99 Fed. 948, citing *Ex parte Yarborough*, (1884) 110 U. S. 651, 28 L. Ed. 274, 4 S. C. R. 152; *United States v. Pridgeon*, (1894) 153 U. S. 48, 59, 38 L. Ed. 631, 14 S. C. R. 746.

39. *Johnson v. Sayre*, (1895) 158 U. S. 109, 39 L. Ed. 914, 15 S. C. R. 773; *Reaves v. Ainsworth*, (1911) 219 U. S. 296, 304, 31 S. C. R. 230. See also, *Winthrop*, Military Law 55-57; *Clode*, Military Law 58; *Greenleaf*, Evidence 470.

40. *Dynes v. Hoover*, (1857) 20 How. (U. S.) 65, 79-82, 15 L. Ed. 838.

41. (1918) 169 N. Y. Supp. 998.

bunals from judicial review. The court said: "The first charge, on which the accused was found guilty, is that having received a lawful command from his superior officer . . . to assist in the preparation of the muster rolls, did wilfully neglect to comply with such order." The court discovered no evidence whatever of either refusal or neglect, and therefore considered itself competent to review and to revise the findings of the court-martial.

In *Smith v. Hoffman*,⁴² the only authority cited in *Higgins v. Stotesbury*, the court held that a military board of examination is a judicial body whose determination may be reviewed by a common law writ of certiorari. The court stated that there is a conflict in the American state authorities on this point.⁴³ But the only case cited, other than the New York decisions, to sustain the position of the court was a Tennessee case, where the court, without any authorities to support it, starts with the assertion, "All inferior courts are erected by statute . . . and subject to the superintendence of our circuit courts."⁴⁴ The court then made the assumption that courts-martial are inferior to judicial courts and reached the natural conclusion that there was a right of appeal to the civil courts. The fallacy of the above assumption is evident when the fact is considered that courts-martial are the creatures of orders; the power to convene them, as well as the power to act upon the proceedings, being an attribute of command.⁴⁵ They are merely instrumentalities of the executive power. Though acting judicially, they are not in any sense judicial bodies.

The New York cases are consistent and sound if one first accepts the reasoning in *Garling v. Van Allen*.⁴⁶ The right to counsel in court-martial proceedings was upheld in this case on the theory that a military tribunal was a court within the meaning of the New York constitution. The chief justice commented upon the "former" extensive powers of courts-

42. (1901) 166 N. Y. 462, 476, 60 N. E. 187, 54 L. R. A. 597.

43. Encyc. of Pl. & Pr., IV, 40.

44. *Durham v. United States*, (1817) 4 Hay. (Tenn.) 54, 69.

45. Davis, *Military Law*, 1915 ed., p. 15.

46. (1873) 55 N. Y. 31.

martial resulting in arbitrary decisions condemned by Blackstone: "How much is it to be regretted that a set of men whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of free men!"⁴⁷ It was the judgment of the court that the powers of courts-martial had been restricted and limited. How or when they did not indicate.⁴⁸ The New York court had previously denied the constitutional right to a jury trial in court-martial proceedings.⁴⁹

The New York courts have simply followed in the more recent cases the doctrine as laid down in *Garling v. Van Allen*. If that case could be supported as properly stating the doctrine of common law, which it did not,⁵⁰ then of course *Higgins v. Stotesbury* would be sound law.

Inasmuch as courts-martial merely make findings which have no effect until approved by the proper superior in command, and dissolve upon making findings, it is an interesting question as to whose duty it would be to make a return on certiorari proceedings.⁵¹

Any decision which purports to uphold the authority of the civil court to review or revise the findings of the military tribunal ignores the fact that courts-martial are courts of honor. The 95th Article of War reads: "Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," and the 96th Article of

47. 1 Blackstone 416. The New York court in *Smith v. Hoffman*, 166 N. Y. 462, 473-74, *supra*, recognizing the military and civil authorities contrary to their decision, observed: "The subject, however, is treated with reference to a standing army rather than the militia of the various states. * * * A member of the state militia belongs to civil life, has a civil avocation, and only occasionally engages in the exercise of arms. A member of the United States army, on the other hand, has no employment except that of a soldier, and arms constitute the business of his life. Hence, more rigid rules and a higher state of discipline are required in one case than in the other."

48. *Smith v. Hoffman*, *supra*.

49. *People v. Daniell*, (1872) 50 N. Y. 274.

50. *Dynes v. Hoover*, *supra*.

51. Winthrop, *Military Law* 55.

War provides: "All disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service" shall be punished at the discretion of the military tribunal. Thus it is evident that standards of conduct unknown to the common law courts are established in the army. Usages and customs peculiar to army life are a part of the system. If the civil court attempted to review the findings of military tribunals it would be incompetent to act, for the simple reason that it would be compelled to apply a standard of conduct with which it is unfamiliar and which is inconsistent with the principles and doctrines of the common law. "In military life there is a higher code termed honor which holds its society to stricter accountability, and it is not desirable that the standard of the army should come down to the requirements of the criminal code."⁵²

(b) We have considered the military person who seeks relief in the civil court from the military tribunal. Let us now consider the military person who pleads as his defense before a civil court his military status or the order of a superior officer.

The soldier establishes a new status by his enlistment. But he cannot and does not discard the obligations, rights, and duties of citizenship. "The soldier is still a citizen, and as such is always amenable to the civil authority."⁵³ In the absence of statutory provisions he is, in general, subject to the same liability for his torts, crimes, and contracts as other citizens.⁵⁴ This is true although the action in a civil court be brought by a soldier against his superior officer. A marine sued his commanding officer for an alleged illegal flogging inflicted for disciplinary purposes while on shipboard in a foreign port. The officer acted within the scope of his authority, but was declared to be liable if the punishment which was inflicted was in the opinion of the jury "in any manner or any degree increased or aggravated by malice or a vindictive feeling." The

⁵². *Fletcher v. United States*, (1891) 26 Ct. of Cl. 563.

⁵³. *State v. Sparks*, (1864) 27 Tex. 627, 632.

⁵⁴. But see Minn. G. S. 1913, § 2379, and similar statutes existing in many of the states.

Supreme Court fully realized the necessity for maintaining the security and efficiency of the Navy, but "at the same time it must be borne in mind that the nation would be equally dishonored if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice."⁵⁵ It is thus evident that the status of a soldier does not prevent his seeking relief in the civil courts even against those who are his superiors in command and for acts which they have done in the execution of their office.

The more common case arises when the soldier pleads his military orders as justification in the defense of a civil or criminal action. Let us first consider the action in tort. In the case of *Bates v. Clark*⁵⁶ the captain and lieutenant in command at Fort Seward, acting under the orders of the commanding general of the Department of Dakota, seized and destroyed liquor which they had good reason to believe, and which they in good faith did believe, was in Indian territory, but which under the interpretation of the Supreme Court was not within Indian territory. Both officers were held liable for damages as trespassers. Said the Court: "Whatever may be the rule in time of war, and in the presence of actual hostilities, military officers can no more protect themselves than civilians for wrongs committed in time of peace under orders emanating from a source which is itself without authority."

It is clearly established that the order of the superior which is illegal in fact cannot be successfully pleaded as a defense in an action for damages. If an officer executes an illegal sentence of court-martial, he is liable for damages.⁵⁷ Chief Jus-

55. *Dinsman v. Wilkes*, (1851) 12 How. (U. S.) 390, 402, 405. 13 L. Ed. 1036.

56. (1877) 95 U. S. 204, 24 L. Ed. 471. See also, *Clark v. Cumins*, (1868) 47 Ill. 372. But see dictum, *Herlihy v. Donohue*, (1916) 52 Mont. 601, 611, 161 Pac. 164, Ann. Cas. 1917C 29. "* * * the inferior military officer may defend his acts against civil liability by reference to the order of his superior, unless such order bears upon its face the marks of its own invalidity or want of authority."

57. But not for punitive damages, if he acts in good faith. *Johnson v. Jones*, (1867) 44 Ill. 142.

tice Marshall in *Wise v. Withers*⁵⁸ observed: "It is a principle that a decision of such a tribunal in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers."

In time of actual warfare, when necessity requires such action, the military commander may seize or destroy private property and he incurs no personal liability. The burden of proving the state of actual necessity, however, rests upon the military person when sued for such an act. Confederate soldiers incurred no liability for destroying property in line with their military duty⁵⁹ But where Confederate officers, acting under orders, took two mules and a wagon for the transportation service of the army they were held liable for damages because "no pressing necessity, in which they were compelled to act promptly, having no time to acquire the property according to law," was shown to exist.⁶⁰

There has been considerable conflict in the decisions of American courts upon the criminal liability of a soldier who acts in good faith in obedience to the orders of a superior officer, which are apparently valid. It has been held that "the order of a superior will be full protection in a criminal prosecution unless the illegality of the order is so clearly shown on its face that a man of ordinary sense and understanding would know it was illegal."⁶¹ Clark and Marshall state the rule as

58. (1806) 3 Cranch (U. S.) 331, 2 L. Ed. 457; *Milligan v. Hovey*, (1871) 3 Biss. (U. S. C. C.) 13; *Barrett v. Crane*, (1844) 16 Vt. 246; *Mills v. Martin*, (1821) 19 John, (N. Y.) 7; *Duffield v. Smith*, (1818) 3 Serg. & R. (Pa.) 590. But see *Shoemaker v. Nesbit*, (1828) 2 Rawle (Pa.) 201; and *Savacool v. Boughton*, (1830) 5 Wend. (N. Y.) 170, 180. The soundness of *Wise v. Withers* was questioned and it was held that if the court has jurisdiction of the subject matter, but not the person of the accused, and its proceedings were in regular course of law, a ministerial officer who executes the sentence will be protected.

59. *Freeland v. Williams*, (1889) 131 U. S. 405, 33 L. Ed. 193, 9 S. C. R. 763.

60. *Bryan v. Walker*, (1870) 64 N. C. 141; *Mitchell v. Harmony*, (1851) 13 How. (U. S.) 115, 14 L. Ed. 75.

61. *Re Fair*, (1900) 100 Fed. 149. See also *United States v. Clark*, (1887) 31 Fed. 710, 717: "Unless the act was manifestly beyond the

follows: "An order given by an officer to his private, which does not expressly and clearly show on its face its own illegality, the soldier is bound to obey and such order is his full protection."⁶² On the other hand, Bishop takes the extreme position that "the command of a superior to an inferior—as, of a military officer to a subordinate, or of a parent to a child—will not justify a criminal act done in pursuance of it; . . . the person doing the wrongful thing is guilty, the same as though he had proceeded self-moved."⁶³ Hence the position of a soldier may be, both in theory and practice, a difficult one. He may, as it has well been said, be liable to be shot by a court-martial if he disobeys an order, and be hanged by a judge and jury if he obeys it.⁶⁴

What, then, is the legal duty of the soldier? Dicey says: "The matter is one which has never been absolutely decided."⁶⁵ A soldier cannot, in all cases, be held to blind obedience to superior orders. Such a doctrine would destroy the very discipline of the army which it seeks to protect. "It would justify the private in shooting his colonel by the orders of the captain, or in deserting to the enemy on the field of battle by order of his immediate superior."⁶⁶ Unless the soldier is bound to disobey or justified in disobeying any order, it would appear that the correct rule is that the soldier must obey, "except in a plain case of excess of authority, where, at first blush, it is apparent and palpable to the commonest understanding that the order is illegal."⁶⁷ This rule is objected to as too in-

scope of his authority, or * * * was such that a man of ordinary sense and understanding would know that it was illegal, it would be a protection to him if he acted in good faith and without malice."

⁶². Law of Crimes, 2nd ed., § 83.

⁶³. New Criminal Law, 8th ed., Vol I, § 355. And see *Rex v. Thomas*, (1815) 4 Maule & Selwyn 442.

⁶⁴. Dicey, Law of the Constitution, 4th ed., p. 282.

⁶⁵. Dicey, Law of the Constitution 283.

⁶⁶. Stephen, History of Criminal Law of England, I, p. 205.

⁶⁷. "Unless the order is plainly illegal, the disobedience of it is punishable under the general article, i. e., the 96th Article. To justify from a military point of view a military inferior in disobeying an order of a superior, the order must be one requiring something

definite. Military orders are frequently communicated orally. They are very difficult to prove in their exact form. It may be almost impossible to prove that the subordinate received the order in the exact form which is necessary for his defense.⁶⁸

The illegal orders of a superior officer can never justify the destruction of property or injury to the person in a civil action for damages.⁶⁹ But an illegal order of a superior "may excuse subordinates who are honestly and reasonably misled thereby," in a criminal action.⁷⁰

(c) An enlisted man, or officer, may be punished by civil authority for violating any law of the land, including a municipal ordinance. It is the duty of the military to deliver over such accused soldier to the civil authority "upon application duly made," except in time of war, or when the person demanded is under court-martial charges "awaiting trial or results of trial, or who is undergoing sentence."⁷¹ When the military jurisdiction has actually attached in the manner stated, the commanding officer may in his discretion deliver the accused soldier to the civil authority. It is, of course, his duty to deliver the accused soldier to the civil authority if court-martial proceedings have not yet begun. The utmost endeavor of the commanding officer to apprehend and secure the accused is required under the Articles of War. Even in time of actual warfare the commanding officer in the absence of special orders may deliver the accused to the civil authority. If the person desired is already undergoing sentence of court-martial, he may be delivered for trial and if convicted the civil sentence merely interrupts the execution of the military sentence,

to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and if done would not be susceptible of being righted." *Manual for Courts-Martial, United States Army, 1917, p. 210.*

68. Brown, 8 Jour. of Crim. Law and Cr. 190, 205.

69. 5 Corpus Juris 366.

70. Ballentine, Proposed Military Code, 14 Mich. Law Rev. 213.

71. 74th Article of War.

which must be completed when he is returned to the military jurisdiction.

This entire question has been modified by the new section in the Articles of War (117):

“When any civil suit or criminal prosecution is commenced in any court of a state against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status . . . such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States.”

This act does not affect those cases in which no claim of defense is made on account of the military status of the accused. It does, however, provide a means of preventing the state courts from deciding whether the accused was acting properly in the execution of his office.

ALBERT J. LOBB *in Minnesota Law Review.*